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Attorneys for Defendant  
BMW of North America, LLC

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA

11  
12 BRIAN Y. CHO, as an individual and on  
behalf of all others similarly situated,

13 Plaintiff,

14 v.

15 BMW OF NORTH AMERICA, LLC; and  
16 DOES 1-100,

17 Defendant.

No. C 09-3880 SI

**BMW OF NORTH AMERICA, LLC'S REQUEST  
FOR JUDICIAL NOTICE IN SUPPORT OF  
MOTION TO DISMISS PLAINTIFF'S INDIVIDUAL  
CLAIMS AND MOTION TO STRIKE CLASS  
ALLEGATIONS**

Date: October 16, 2009  
Time: 9:00 a.m.  
Courtroom: 10

Hon. Susan Illston

1 Pursuant to Federal Rules of Evidence 201(b)(2), BMW NA requests that the Court take  
2 judicial notice of documents attached hereto and referenced in BMW NA's Motion to Dismiss  
3 Plaintiff's Individual Claims and Motion to Strike Class Allegations, both of which are filed  
4 contemporaneously herewith. The documents include:

5 Exhibit A—True and correct copies of relevant warranties covering plaintiff's high-  
6 pressure fuel pump, including the Federal Emissions Systems Defect Warranty, the Federal  
7 Emissions Performance Warranty, and the terms and conditions of the extended warranty for  
8 plaintiff's 2008 BMW 535i.

9 Judicial notice of the warranty documents is proper because they are referenced by plaintiff  
10 throughout his Complaint. "Even if a document is not attached to a complaint, it may be  
11 incorporated by reference into a complaint if the plaintiff refers extensively to the document or  
12 the document forms the basis of the plaintiff's claim." *Hoey v. Sony Electronics Inc.*, 515 F.  
13 Supp. 2d 1099, 1103 (N.D. Cal. 2007) (allowing judicial notice of express warranty; citing *United*  
14 *States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)). Specifically, plaintiff refers to these  
15 documents and/or incorporates them by reference at paragraphs 17(g), (h) and (i), 21, 32, 33, 34,  
16 35, 37, 48, 51, and 52 of his Complaint. Thus, the Court may consider these documents in ruling  
17 on the motions to dismiss and strike.

18 Dated: August 31, 2009

Respectfully submitted,

19 CARROLL, BURDICK & McDONOUGH LLP  
20

21 By /s/ Troy M. Yoshino  
22 Troy M. Yoshino  
23 Attorneys for Defendant  
24 BMW of North America, LLC  
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**EXHIBIT A**



### **Federal Emissions System Defect Warranty (Valid only in the U.S.A. and Puerto Rico)**

This warranty applies only to U.S. specification vehicles distributed by BMW of North America (BMW NA) or sold through the BMW NA European Delivery Program.

In accordance with the defect warranty provisions of section 207(b) of the Clean Air Act, BMW NA warrants to the first retail purchaser, and each subsequent purchaser, that the car (a) was designed, built and equipped so as to conform, at the time of sale, with all regulations of the U.S. Environmental Protection Agency applicable at the time of manufacture and (b) is free from defects in materials and workmanship which would cause it to fail to conform with applicable regulations for a period of 2 years or 24,000 miles, whichever occurs first, except for specific emission control components (as listed on page 37), for which the warranty period is 8 years or 80,000 miles, whichever occurs first.

This warranty begins on the date of first retail sale, or the date the vehicle is first placed in service as a demonstrator or company vehicle, whichever is earlier.

Warranty claims must be made as soon as reasonably possible after a defect is discovered. To make a claim, the car must be brought to any authorized BMW center during normal business hours.

The BMW center will, without charge for parts or labor (including diagnosis), either repair or replace the defective part, if any. The decision whether to repair or replace said parts is solely the prerogative of BMW NA and must be expected to correct the failure of the warranted part. Parts for which replacements are made become the property of BMW NA. In all cases, a reasonable time must be allowed for warranty repairs to be completed after the car is received by the BMW center.

For assistance in determining which specific parts or components of your vehicle are covered under this warranty, please contact your BMW center.

It is the owner's responsibility to have all scheduled inspection and maintenance services performed (at the owner's expense), as prescribed in the maintenance schedule for the BMW Emission Control System. Service intervals are computed by the onboard BMW service interval indicator and displayed on the instrument panel. The instructions for proper maintenance and use can be found in the Owner's Manual. It is strongly recommended that any replacement parts used for maintenance, repair or replacement of emission control systems be certified BMW Service Parts or BMW Authorized Remanufactured Parts. Without invalidating this warranty, the owner may elect to have maintenance, repair or replacement of the emission control systems performed by any automotive repair establishment, or elect to use parts other than certified BMW Service Parts. However, the cost of such service or parts will not be covered under this warranty, except in emergency situations. In an emergency situation, where an authorized BMW center or a warranty replacement part is not reasonably available (within 30 days), repairs may be performed at any available service establishment using any equivalent part. BMW NA will reimburse the owner for such emergency repairs (including labor, parts and diagnosis not to exceed BMW NA rates for labor, parts, and diagnosis in said area) that are covered under this warranty. Replaced parts and paid invoices must be presented at a BMW center as a condition of reimbursement for emergency repairs not performed by a BMW center.

The use of replacement parts, which are not of equivalent quality, may impair the effectiveness of the emission control system. If other than certified BMW Service Parts or Authorized Remanufactured Parts are used for maintenance, repair or replacement of components affecting emission control, the owner should obtain assurances that such parts are warranted by their manufacturer to be equivalent to genuine BMW parts in performance and durability. BMW NA assumes no liability under this warranty with respect to parts other than genuine BMW parts.

However, the use of non-BMW replacement parts or non-EPA certified parts does not invalidate the warranty on other components, unless non-BMW parts or non-EPA certified parts cause damage to warranted parts.



### **What is not covered**

This warranty does not cover malfunctions caused by any of the following: accident, flood, misuse, improper adjustment, modification, alteration, tampering, disconnection, improper or inadequate maintenance, use of leaded fuel or fuels containing more than 10% ethanol, or other oxygenates with more than 2.8% oxygen by weight (i.e., more than 15% MTBE or more than 3% methanol plus an equivalent amount of co-solvent).

The replacement of maintenance parts, such as spark plugs, filters and similar items used in required maintenance services, the repair or replacement of maintenance parts beyond the first required inspection/maintenance, or if the part has been replaced earlier for reasons other than it being defective.

The car or any part of the car unless a failure causes the car to fail to conform to applicable emission regulations.

Any car on which the odometer has been replaced or altered and the true mileage cannot be determined.

The car, if the vehicle identification number is altered or cannot be read, or if the car has been declared a total loss or sold for salvage purposes.

### **General**

These warranties give you specific legal rights, and you may also have other rights which vary from state to state.

THE DURATION OF ANY IMPLIED WARRANTIES, INCLUDING THE IMPLIED WARRANTY OF MERCHANTABILITY, IS LIMITED TO THE DURATION OF THE EXPRESS WARRANTIES HEREIN.

BMW NA HEREBY EXCLUDES INCIDENTAL AND CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF TIME, INCONVENIENCE, OR LOSS OF USE OF THE VEHICLE, FOR ANY BREACH OF ANY EXPRESS OR IMPLIED WARRANTY, INCLUDING THE IMPLIED WARRANTY OF MERCHANTABILITY, APPLICABLE TO THIS PRODUCT.

Some states do not allow limitations on how long an implied warranty lasts, or the exclusion or limitation of incidental or consequential damages, so the above limitations and exclusions may not apply to you. Additionally, if you are a California, Connecticut, Maine, Massachusetts, Rhode Island or Vermont resident and your vehicle is registered in that state, your vehicle is eligible for California Emissions Warranty coverage.

These federal warranty provisions also apply to all vehicles sold in all U.S. states and territories regardless of whether a state has enacted state warranty provisions that differ from the federal provisions.

### **Federal Emissions Performance Warranty (Valid only in the U.S.A. and Puerto Rico)**

In those states and jurisdictions that have established periodic vehicle emissions tests to encourage proper vehicle maintenance and require the car to pass an emissions test approved by the U.S. Environmental Protection Agency and:

1. The car was distributed by BMW of North America (BMW NA), or sold through the BMW NA European Delivery Program; and
2. The car has been maintained and operated in accordance with the instructions for proper maintenance and use set forth in the Owner's Manual supplied with the car; and
3. The car fails to conform to the applicable emissions standards of the EPA as judged by an EPA approved emissions test; and
4. The failure to conform results or will result in the owner of the car having to bear a penalty or other sanction (including the denial of the right to use the car) under local state or federal law if the non-conformity is not remedied within a specified period of time.

Then, in accordance with the provisions of section 207(b) of the Clean Air Act, BMW NA warrants that if the car is eligible for coverage under this warranty, any non-conformities in the car, which cause it to fail an EPA-approved emissions test will, without charge for parts or labor (including diagnosis), be adjusted, repaired, or replaced, at the option of BMW NA to proper specifications, in order to make the car comply with applicable emissions standards. The decision to adjust, repair or replace parts is solely the prerogative of BMW NA and must reasonably be expected to correct the failure of the warranted part.

This warranty begins on the date of first retail sale, or the date the vehicle is first placed in service as a demonstrator or company vehicle, whichever is earlier. This warranty continues for a period of 2 years or 24,000 miles, whichever occurs first, except for specific emissions control components (as listed on page 37), for which the warranty period is 8 years or 80,000 miles whichever occurs first.

This warranty is made subject to the terms and conditions that apply to the Emission Control System Warranty and the New Vehicle Limited Warranty.

No claim under this warranty will be denied on the basis of use of a properly installed EPA certified emission part for maintenance and repair.

A vehicle manufacturer may deny an emission performance warranty claim on the basis of an uncertified replacement part used in the maintenance or repair of a vehicle only if the vehicle manufacturer presents evidence that the uncertified replacement part is either defective in materials or workmanship or not equivalent from an emission standpoint to the original equipment part.

**Maintenance, replacement, or repair of emission control devices and systems may be performed by any automotive repair establishment or individual using any certified part.**

Immediately after the car has failed an EPA approved emission short test, your claim can be made at any authorized BMW center. The BMW center will honor or deny your claim within the time period specified by local or state laws (not to exceed 30 days), to avoid further penalties or sanctions. If the claim is denied, the BMW center will notify you in writing of the reason(s). The BMW center is required by law to honor the claim if notice of denial is not received by the owner within the specified time period.

You may obtain further information concerning the emission warranties, or report violations of warranty terms, by contacting the Director, Field Operations and Support Division (6406J), Environmental Protection Agency, 401 "M" Street, SW, Washington, D.C. 20460.

The following systems are covered by the Federal Emission Performance Warranty for a period of two years or 24,000 miles, whichever occurs first. The specific systems may vary according to model, therefore, all of the systems listed may not be used on your vehicle. For assistance in determining which systems and specific components within these systems apply to your vehicle, please contact your BMW center.

AIR INDUCTION SYSTEM

FUEL METERING SYSTEM

IGNITION SYSTEM

POSITIVE CRANKCASE VENTILATION SYSTEM (PCV)

FUEL EVAPORATIVE CONTROL SYSTEM

EXHAUST SYSTEM

ENGINE EMISSION CONTROL SYSTEM

SENSORS/DEVICES

ON BOARD DIAGNOSTIC SYSTEM (OBD)

RELATED PARTS ASSOCIATED WITH THE ABOVE SYSTEMS

The following components and/or system are/is covered under the Federal Emission Warranty for a period of 8 years or 80,000 miles, whichever occurs first.

CATALYTIC CONVERTER

ENGINE CONTROL MODULE (INCLUDING ON-BOARD DIAGNOSTIC SYSTEM)

For assistance in determining coverage of the specific components of the on-board diagnostic system, please contact your BMW center.



# BMW



Dear Valued Customer,

BMW is committed to delivering the ultimate in product satisfaction to you, our customer. Our interest in your vehicle doesn't stop with its sale; rather, it continues throughout the vehicle's warranty period and beyond.

BMW has become aware of a potential problem that could affect the durability of the high-pressure fuel pump of certain MY 2007/2008 BMW automobiles equipped with a 3.0 liter engine. We estimate that only a small percentage of vehicles will actually develop a problem. Vehicles affected may have the Service Engine Soon lamp illuminated. Also, the affected vehicles may experience an extended engine starting time ("long crank") or reduced engine performance when the high-pressure fuel pump malfunctions.

As a commitment to our customers and to demonstrate our confidence in our product, BMW will extend the emissions warranty for the high-pressure fuel pump to 10 years or 120,000 miles, whichever comes first. The emissions warranty extension for this component applies to your vehicle and is transferable to any subsequent purchaser of your car. All terms and conditions of the California Emissions Warranty, the Federal Emissions Defect Warranty, and the Federal Emissions Performance Warranty apply to the extended warranty. Warranty coverage for all other parts is not affected. Warranty terms and conditions can be found in your warranty booklet.

The integrity of our products has been essential to our reputation, our success, and our customer's trust. We hope this extension of the emissions warranty will further enhance your ownership experience and satisfaction. Should you have any questions, please call us toll-free at 1-800-831-1117.

In the unlikely event that the high-pressure fuel pump of your vehicle shows the above symptoms or any other problem, please feel free to call the nearest authorized BMW dealer for an appointment. All authorized BMW dealers will be informed of this warranty extension via a Service Information bulletin.

Please be assured that we at BMW are totally committed to the highest standards of product excellence and owner experience, and are determined to maintain a level of service that exceeds your expectations.

Thank you for your cooperation in this matter.

Very truly yours,

BMW of North America, LLC

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BMW Group Company

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